



# COMPLIANCE BULLETIN

## HIGHLIGHTS

- Employers would be prohibited from keeping employee tips.
- Non-tipped employees would be able to share in the tip pool if their employer does not use the tip credit.
- Employers would be able to use the tip credit for non-tipped activities that are “contemporaneously” performed with tipped activities.

## IMPORTANT DATES

**October 8, 2019**

Publication of the proposed rule on tip regulations

**December 9, 2019**

Expiration of comment period for proposed rule

## DOL Proposes to Amend Employee Tip Regulations

### OVERVIEW

On Oct. 8, 2019, the U.S. Department of Labor (DOL) published a [proposed rule](#) to amend employee tip regulations under the Fair Labor Standards Act (FLSA). This proposed rule has been issued, in part, to incorporate legislation approved by Congress in 2018. The rule also incorporates guidance the DOL has published over the years about tipped wages.

Some expect the proposed rule will “provide employers greater flexibility in determining pay practices for tipped and non-tipped workers.” These individuals also expect that the proposed rule “may allow for a reduction in wage disparities among employees who contribute to the customers’ experience.”

### ACTION STEPS

The DOL is [inviting the public to comment](#) on this proposed rule. Employers and individuals who wish to comment must submit their remarks by **Dec. 9, 2019**.

In addition, because the rule offers a departure from current practices, affected employers should become familiar with this proposal and monitor DOL activity regarding the rule.

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## Minimum Wage, Cash Wage and Tip Credit

The FLSA requires covered employers to pay their employees' wages at a rate that is at least equal to the federal minimum wage rate, which is currently set at **\$7.25 per hour**. However, the FLSA also allows an exemption for tipped employees. **Tipped employees** under the FLSA are individuals who are engaged in an occupation in which they "customarily and regularly" receive **at least \$30 in tips per month**.

Under the tipped employee exemption, employers can pay their tipped employees a lower wage—also known as a **cash wage**—of \$2.13 per hour, as long as the employee's tips are sufficient to make up the difference between the cash wage and the federal minimum wage rate. The difference between these two rates is known as a **tip credit**. Based on the current federal minimum wage rate and cash wage, the current tip credit is **\$5.12 per hour**.

Using the tip credit is permitted only when, among other things, employers allow their employees to retain all of their tips.

## Tip Pooling

The FLSA also allows employers to collect all the tips employees receive into a common employee tip pool. This practice enables the employer to then redistribute wages among tipped employees in an equitable manner. However, under the law, employers that use a tip credit to calculate their employees' wages are permitted to redistribute pooled tips only among tipped employees.

But the law didn't explicitly address whether this restriction also applied to employers that do not use a tip credit. As a result, in 2011, the DOL revised its tip regulations to extend tip pooling restrictions to all employers, regardless of whether they use the tip credit. This meant that pooled tips could only be redistributed among tipped employees, and not shared with non-tipped employees, such as dishwashers and cooks.

## The Proposed Rule

In 2018, Congress amended section 3(m) of the FLSA in the [Consolidated Appropriations Act](#) (CAA). Among other things, the CAA overturned the DOL's authority to extend the restriction on tip-pooling to employers that do not use the tip credit. The DOL is issuing the current proposed rule to harmonize FLSA standards with the CAA. The rule, if finalized, would also codify long-standing DOL guidance on how employers should handle tip wages.

If adopted, the new rule would:

- ✓ Prohibit employers from keeping their employees' tips and specifically prohibit managers and supervisors from keeping any portion of employee tips, including tips from a tip pool;
- ✓ Limit an employer's control over employee tips to:

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- Distributing tips to the employees who received them;
- Implementing mandatory tip pools in compliance with FLSA regulations;
- Redistributing pooled tips to employees in the pool;
- ✓ Use the executive exemption's duties test to determine whether an employee is a manager or supervisor (managers and supervisors would not be allowed to keep any portion of an employee's tips);
- ✓ Remove the restrictions on an employer's use of employees' tips when the employer does not take a tip credit (this would allow employers that do not take an FLSA tip credit to distribute pooled tips to a broader group of workers, such as cooks or dishwashers);
- ✓ Require employers to redistribute pooled tips at least as often as when they pay wages (this aligns the policy for cash tips with the current policy for tips paid via credit card);
- ✓ Incorporate new civil money penalties, as required by the CAA (current penalties cannot exceed \$1,100). These new penalties would be imposed when an employer unlawfully keeps tips. The DOL would only assess these new penalties when the violations are repeated or willful;
- ✓ Require employers that do not take a tip credit to keep records of those employees who receive tips and the tip amounts they receive; and
- ✓ Allow employers to use the tip credit when they pay employees who perform tipped and non-tipped activities, but only if non-tipped activities are performed "**contemporaneously**" with tipped activities. Contemporaneously would also include activities that are performed at a reasonable time immediately before or after performing tipped activities or duties.

Finally, the new rule would also harmonize FLSA requirements with Executive Order 13658 (Establishing a Minimum Wage for Contractors) and withdraw the DOL's 2017 proposed rule on tip credit regulations (the 2017 proposed rule has been superseded by the CAA).